Supreme Court, U.S.
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No. ____

IN THE
# Supreme Court of the United States

TIMOTHY J. MILES,
Petitioner,

*v.*

H-QUOTIENT, INC.,
Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

MICHAEL M. YORK
*Counsel of Record*
*WEHNER & YORK, P.C.*
*11860 Sunrise Valley Drive*
*Suite 100*
*Reston, Virginia 20191*
*(703) 476-8000*

## QUESTIONS PRESENTED

1. Whether a district court's remand order pursuant to the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77p, 78bb, must be reviewable by a federal court in order to effectuate Congress's plan for a uniform, federal forum for certain state-law class actions.

2. Whether Congress, in completely preempting state-law class actions asserting securities fraud claims, conferred subject-matter jurisdiction upon district courts *ab initio*, thus requiring that remand orders in such cases be reviewable by a federal court.

## PARTIES TO THE PROCEEDING

Petitioner is Timothy J. Miles, an individual not related to any publicly held or publicly traded company. Respondent is H-Quotient, Inc.

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## PETITION FOR A WRIT OF CERTIORARI

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Timothy J. Miles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, Case No. 05-1120, dated June 8, 2005, dismissing petitioner's appeal of the district court order of remand. The case involves state-law securities claims completely preempted by the Securities Litigation Uniform Standards Act of 1998 (SLUSA) 15 U.S.C. §§ 77p, 78bb.

## OPINIONS BELOW

The June 8, 2005, order of the court of appeals (Pet. App. *infra* 1a) is unreported. The district court's order remanding the claims to state court is unreported (Pet. App. *infra* 2).

## JURISDICTION

The certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS

1. The Securities Litigation Uniform Standards Act of 1998 (SLUSA) completely preempts certain state-law class actions involving securities fraud claims. 15 U.S.C. §§ 77p, 78bb. The pertinent provisions are set forth in an appendix to this petition (Pet. App. *infra* 3a).

2. The Private Securities Litigation Reform Act of 1995 (PSLRA) substantially raised the pleading standards for securities fraud claims in federal court above those set forth in Rule 9(b) of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4 *et seq.* (1995) The pertinent provisions are set forth in an appendix to this petition (Pet. App. *infra* 13a).

## STATEMENT

This case involves the scope and implications of complete federal preemption and Congress's power to divest state courts of all jurisdiction over certain claims. In 1998, Congress determined that widespread abuse of class-action claims based on alleged securities fraud required a dramatic,

and some would say,[1] extreme federal solution. H. R. Rep. No. 105-640, at 10 (1998).

Three years earlier, Congress sought to address the problem by enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), which imposed stringent pleading and proof requirements for certain class actions. 15 U.S.C. § 78u-4 *et seq.* (1995).

Almost immediately, Congress determined that creative lawyers could avoid those requirements by pleading only state-law claims. S. Rep. No. 105-182, at 3-4 (1998). In response, Congress enacted the Securities Litigation Uniform Standards Act of 1998 (SLUSA), making it plain that all such claims must be resolved by a federal court. 15 U.S.C. §§ 77p, 78bb.

In SLUSA, Congress set forth a straightforward procedure to effectuate its intent. State claims of securities fraud asserted on behalf of more than 50 persons are to be removed to federal court and then dismissed. Thus, the crucial step in the process is the district court's determination of whether the removed claims are of the type Congress intended to completely preempt. 15 U.S.C. § 77p.

The Second and Ninth Circuits have held that SLUSA remands are not reviewable by circuit courts. The Seventh Circuit has held that appellate review of these district court remand orders is not only permissible, but required. Reviewability is necessary, the Seventh Circuit reasoned, to carry out Congress's intent to completely preempt federal securities law claims. *Kircher v. Putnam Funds Trust,* 373 F.3d 847 (2004).

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[1] An excellent scholarly review of SLUSA explores the complete preemption doctrine. However, the author does not extend that analysis to the issue of reviewability of remand orders. Jennifer O'Hare, *Preemption Under the Securities Litigation Uniform Standards Act: If It Looks Like a Securities Fraud Claim and Acts Like a Securities Fraud Claim, Is It a Securities Fraud Claim?* 56 Ala. L. Rev. 325 (2004).

All of the policy considerations and procedural issues noted in these court of appeals decisions are present in this case.

This case is a SLAPP suit, or a Strategic Lawsuit Against Public Participation. The respondent, H-Quotient, Inc., filed this lawsuit against petitioner Timothy J. Miles in the Fairfax, Virginia, Circuit Court on November 7, 2003, asserting state-law claims of defamation and securities fraud. At that time, the petitioner operated the Web site Our-Street.com, which he characterized as a crusading bulletin board of information about corporate greed and dishonesty.

Respondent has asserted claims for securities fraud, based upon allegations of reliance by its shareholders and others. H-Quotient expressly disclaims that it relied on any allegedly false statements by Miles. Respondent seeks to recover for losses incurred by its various shareholders from their purchases and sales of H-Quotient stock. The shareholders entered into the stock transactions, respondent maintains, relying upon statements published on petitioner's Web site. Respondent seeks to recover $2 million in damages, which it would presumably distribute to its shareholders.

Petitioner removed this case to the United States District Court for the Eastern District of Virginia, stating in its Notice of Removal that the respondent's securities fraud claims were completely preempted and that Congress had established a mechanism for such state-law claims to be removed to federal court and then dismissed.

Petitioner submitted that SLUSA was applicable to the claims because they met the two chief requirements for preemption. First, the claims were asserted on behalf of more than 50 persons, and thus constituted a "covered class action" under the Act's definition of that term.[2] Second, the claims related to the purchase or sale of a "covered security."

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[2] The definition of a class action contained in SLUSA is substantially broader than that of FED. R. CIV. P. 23. See 15 U.S.C. § 77p(f)(2)(A).

The respondent did not seriously dispute that its fraud claims related to transactions involving a covered security, but argued that, the language of its complaint notwithstanding, it sought to recover only for its own losses from its own stock transactions. On January 24, 2005, the district court ruled that the respondent's complaint did not satisfy the "covered class action" requirement of SLUSA and ordered the case remanded to state court (Pet. App. *infra* 2).

Miles sought a review of the district court's order, and on June 8, 2005, the Fourth Circuit issued a one-paragraph order dismissing the appeal. The order did not state the basis for the Court's ruling. A copy of the order is attached in an appendix to this petition (Pet. App. *infra* 1).

## REASONS FOR GRANTING THE PETITION

Petitioner seeks a writ of certiorari to resolve a split among the circuits regarding an important issue – the scope of complete federal preemption in the context of SLUSA remands.

Petitioner submits that the procedural posture of this case provides an appropriate opportunity for the Court to decide this issue.

### A. *There is a Circuit Split on the Issue of Reviewability of SLUSA Remands*

Supreme Court Rule 10(a) states that when granting certiorari, this Court will consider whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

Three circuits, the Second, Seventh and Ninth Circuits, have issued conflicting opinions on the reviewability of

SLUSA remands.[3] The Seventh Circuit, acknowledging the conflict with other circuits, decided that appellate review of remand orders under SLUSA is required. *Kircher,* 373 F.3d at 851. The Seventh Circuit observed that what the district court termed a "lack of subject-matter jurisdiction" was in truth an erroneous finding that SLUSA was not applicable to plaintiffs' claims. The Seventh Circuit then applied the Act's language and the underlying Congressional intent to the facts and determined that the remand order must be reviewable. *Kircher*, 373 F.3d at 849. That court explained that SLUSA remands must be reviewed by the circuit court in light of Congress's express intent to completely preempt state-law securities claims of this type. See *Kircher*, 373 F.3d at 849.

In contrast, the Second and Ninth Circuits ruled that 28 U.S.C. § 1447(d) stands as an absolute bar to judicial review of a SLUSA remand. However, neither circuit reconciled Congress's express intent to completely preempt state-law securities fraud claims asserted as class actions in the context of reviewing remand orders, and treated the matter as a normal preemption claim to be determined by the state courts. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116 (2d Cir. 2003); *United Investors Life Insurance Co. v. Waddell & Reed, Inc.*, 360 F.3d 960 (9th Cir. 2004).

The Seventh Circuit noted that the Second and Ninth Circuit decisions in *Spielman* and *United Investors Life Insurance Co.*, respectively, were inconsistent with this Court's holdings in *Scarborough v. Principi,* 541 U.S. 401 (2004), and *Kontrick v. Ryan,* 540 U.S. 443 (2004). In *Kontrick*, this Court stated that "[o]nly Congress may determine a lower federal court's subject matter

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[3] In addition, the Third Circuit, in *Rowinski v. Salomon Smith Barney Inc.*, 348 F. 3rd 294, 298 (3d Cir. 2005), has taken note of the split. Because *Rowinski* dealt with the review of a decision in which the district court denied a motion to remand, the Third Circuit did not address the issue of reviewability.